



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF C-C-C-C-

DATE: DEC. 9, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a church, sought to employ the Beneficiary as an education pastor.¹ It requested classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The petition was initially approved. The Acting Director of the Texas Service Center subsequently revoked the approval of the petition, concluding that based on inconsistencies in the record, the Petitioner did not establish that it was actually conducting business as a church at the time of filing or that it was able to offer *bona fide* employment to the Beneficiary. The Director also noted inconsistencies in the Petitioner's audited financial statements that were submitted to establish its continuing ability to pay the proffered wage.

On appeal, the Appellant² submits additional evidence and asserts that the Petitioner was actually conducting business as a church at the time of filing and that it was able to offer *bona fide* employment to the Beneficiary. It also asserts that the Director erred in her assessment of the Petitioner's audited financial statements.

Upon *de novo* review, we will dismiss the appeal.

¹ The Petitioner was involuntarily dissolved on [REDACTED] 2018, in Illinois. Ill. Sect. of State, <https://www.ilsos.gov/corporatellc/CorporateLlcController> (last visited Aug. 27, 2018). The Beneficiary requested that he be able to "port" to another employer, [REDACTED] under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21).

² The Appellant is [REDACTED] the Beneficiary's new employer. Generally, a subsequent employer to whom an AC21 beneficiary is porting is *not* an affected party who may participate in proceedings related to the underlying immigrant visa petition. See *Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017). However, in *Musunuru v. Lynch*, 831 F.3d 880 (7th Cir. 2016), the Seventh Circuit determined that a successor employer is entitled to participate in visa proceedings related to the underlying visa petition. We will follow the ruling in this case arising in the Seventh Circuit. See *Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989) (stating that "[w]here we disagree with a court's position on a given issue, we decline to follow it outside the court's circuit").

I. LAW

A. The Employment-Based Immigration Process

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).³ *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

B. Revocation of a Petition's Approval

After granting a petition, USCIS may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Good and sufficient cause exists to issue a notice of intent to revoke (NOIR) where the record at the time of the notice's issuance, if unexplained or un rebutted, would have warranted the petition's denial. *Matter of Esteime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation is proper if the record at the time of the decision, including any explanation or rebuttal evidence provided by a petitioner, warranted a petition's denial. *Id.* at 452.

II. BONA FIDE JOB OFFER

The Director concluded that the Petitioner did not establish that it was actually conducting business as a church at the time of filing or that it was able to offer *bona fide* employment to the Beneficiary.

A petitioner must be "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. It must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a denial where, contrary to an accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis). A petitioner must establish this intent to employ a beneficiary in a *bona fide* position at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). In this revocation case, the

³ The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is September 24, 2013. *See* 8 C.F.R. § 204.5(d).

offer of employment must be *bona fide*, and the Petitioner “must have had the intent, at the time the Form I-140 was approved, to employ the beneficiary upon adjustment.”⁴ For labor certification purposes, the term “employment” means “[p]ermanent, full-time work.” 20 C.F.R. § 656.3.

The petition and labor certification indicated that the offered position was for an education pastor who, among other duties, would lead regular youth religious services and oversee religious education programs at [redacted] Drive, [redacted] Illinois. In its supporting letter with the petition, the Petitioner indicated that it “provides adult Sunday service, adult Sunday bible study, Sunday teen service, Friday bible study, Sunday school, and Saturday worship services.” With the petition, the Petitioner submitted untranslated excerpts from a website,⁵ and power bills for [redacted] Bible Institute, located at [redacted] Avenue, [redacted] Illinois. The power bills list a different name and address for the Petitioner than the name and address provided on the petition and labor certification.

In a request for evidence (RFE), the Director requested additional evidence regarding the Petitioner’s official name and location. In response, the Petitioner indicated that the actual church is located at the [redacted] Avenue address, while its administrative operation is located at [redacted] Drive address. It submitted a tax exemption letter issued to the Petitioner by the Illinois Department of Revenue; bank statements; IRS Forms W-2, Wage and Tax Statements, issued to the Beneficiary by the Petitioner in 2013 and 2014; and a letter from the Petitioner regarding the Beneficiary’s optional practical training. All of these documents reference the [redacted] Drive address.

The Director later examined the evidence submitted with the petition and in response to the RFE and determined that it was insufficient to demonstrate the Petitioner’s intent to employ the Beneficiary in the offered job. As the record at the time of the notice’s issuance, if unexplained or un rebutted, would have warranted the petition’s denial, the NOIR was issued for good and sufficient cause. In the NOIR, the Director noted that, due to inconsistencies regarding its actual location, the job offer may no longer exist. She requested evidence of the *bona fides* of the job offer including, but not limited to, a current lease; valid business licenses; corporate organizational documentation; Internal Revenue Service correspondence; quarterly wage reports; federal tax returns; and invoices or payment receipts. The Director indicated that the Petitioner must resolve any inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-592. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

⁴ Memorandum from William R. Yates, Assoc. Dir. For Operations, USCIS, HQBCIS 70/6.2.8-P, *Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (AD03-16)* 3 (Aug. 4, 2003), <https://www.uscis.gov/legal-resources/policy-memoranda>.

⁵ A full English language translation must accompany any document containing foreign language. 8 C.F.R. § 103.2(b)(3). The translator must certify that the translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. *Id.* Because the Petitioner did not submit a properly certified English language translation of the documents, we cannot meaningfully determine whether the website material supports the Petitioner’s claims.

In response to the NOIR, the Petitioner submitted a printout dated August 22, 2017, from the Illinois Secretary of State indicating that the Petitioner was incorporated in 2009 and was in active status in Illinois.⁶ No additional evidence regarding the *bona fides* of the job offer was submitted. In response to the NOIR, counsel⁷ also stated that the Beneficiary, under the terms of AC21,⁸ ported to the Appellant on June 12, 2016.

In her decision, the Director found that the evidence submitted in response to the NOIR did not establish that the Petitioner was actually conducting business as a church at the time of filing or that it was able to offer *bona fide* employment to the Beneficiary. She noted that the Petitioner listed its address on the petition and labor certification as [redacted] Drive, [redacted] Illinois. This address is also listed as the location where the Beneficiary will work. No alternative address was listed on either form. Further, the Director noted that public records indicate that the [redacted] Drive address is the residential address for the signatory on the petition, [redacted]. The Director also indicated that public records show that the [redacted] Avenue address is an office building and not a church building.

On appeal, the Appellant asserts that “through evidence initially submitted... it has established that it was actually conducting business as a church at the time of filing and it was able to offer *bona fide* employment to the Beneficiary.” It submits no new evidence to support these assertions.⁹ Regardless of the Beneficiary’s request to port to new employment, in order to be eligible for the benefit requested the Petitioner must have intended to employ the beneficiary in a *bona fide* position as described on the labor certification. The job duties of the offered job require space to conduct religious worship and religious education. The Petitioner’s two locations appear to be a residence and an office building, neither of which have been shown to be suitable for religious worship and religious education. The record contains no independent, objective evidence showing that the Petitioner conducted religious services in a church or that it had a congregation who would be taught by the Beneficiary in the capacity of education pastor. *Matter of Ho*, 19 I&N Dec. at 591-592. Furthermore, despite the Director’s request to provide a current lease, valid business licenses, tax documentation, and invoices or payment receipts which might support the Petitioner’s assertion that it was conducting business as a church, the Petitioner declined to do so. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

⁶ In response to the NOIR, the Petitioner also submitted evidence regarding its ability to pay the proffered wage and evidence of the Beneficiary’s employment by the Appellant.

⁷ The same counsel represents the Petitioner, the Beneficiary, and the Appellant in this case.

⁸ Pub. L. No. 106-313, 114 Stat. 1251, codified in relevant part within the Act at section 204(j), 8 U.S.C. § 1154(j). AC21 allows a beneficiary of an approved employment-based immigrant visa petition, whose adjustment of status application has been pending for more than 180 days, to change jobs or employers if the new job is in the same or similar occupational classification, without relying upon the new employer to file a new labor certification or Form I-140, Immigrant Petition for an Alien Worker, to support his or her adjustment of status.

⁹ A petitioner bears the burden of establishing eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

The record lacks sufficient evidence to establish that the Petitioner was conducting business as a church at the time of filing or that it was able to offer *bona fide* employment to the Beneficiary. The petition's approval was properly revoked on this basis.

III. ABILITY TO PAY THE PROFFERED WAGE

In her decision, the Director noted inconsistencies in the Petitioner's audited financial statements that were submitted to establish its continuing ability to pay the proffered wage. The proffered wage is \$28,309 per year. In this revocation proceeding, the Petitioner must establish its ability to pay the proffered wage from the priority date of September 24, 2013, to the date of the petition's initial approval on August 20, 2015.¹⁰

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date.¹¹ If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.¹²

The record contains the Petitioner's audited financial statements for the last four months of 2013; for calendar year 2014; and for the first six months of 2015. In the NOIR, the Director noted that the submitted statements were not signed. In response to the NOIR, the Petitioner stated that the auditor's reports accompanying the financial statements were properly signed by its auditing firm. In her decision, the Director found that the Petitioner did not establish its ability to pay the proffered

¹⁰ As noted in *Matter of Estime*, "with respect to a decision to revoke, we ask whether the evidence of record *at the time the decision was issued*... warranted such a denial." 19 I&N Dec. at 452 (emphasis added).

¹¹ The record demonstrates that the Petitioner paid the Beneficiary \$11,000 in 2013 and \$7,000 in 2014.

¹² Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 F. App'x 292, 294-295 (5th Cir. 2015).

wage because the auditor's reports were not properly signed and the auditing firm did not appear to be licensed in Illinois.

On appeal, the Petitioner submits a letter from a certified public accountant indicating that the auditor's reports were properly signed by the auditing firm, and that the auditing firm was properly licensed in Illinois. We agree with the Appellant's assertions on appeal that the Petitioner's audited financial statements were validly prepared by a licensed certified public accounting firm.¹³ While the audited financial statements establish the Petitioner's ability to pay the proffered wage in 2013 and 2014, they do not establish its ability to pay the proffered wage in 2015. As we previously noted, in this revocation proceeding, the Petitioner must establish its ability to pay the proffered wage from the priority date of September 24, 2013, to the date of the petition's initial approval on August 20, 2015. The Petitioner's 2015 audited financial statements in the record cover the period between January 1 and June 30, 2015; they do not cover the period between July 1 and August 20, 2015. Thus, the record lacks regulatory-prescribed evidence of the Petitioner's ability to pay the proffered wage for 2015.¹⁴

The record lacks sufficient evidence to establish that the Petitioner had the ability to pay the proffered wage from the priority date to the petition's approval date. The petition's approval was properly revoked on this basis.

IV. CONCLUSION

We find that the Director properly revoked the approval of the petition because the record did not establish that the Petitioner was actually conducting business as a church at the time of filing or that it was able to offer *bona fide* employment to the Beneficiary. Further, the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date.

ORDER: The appeal is dismissed.

Cite as *Matter of C-C-C-C-*, ID# 1443507 (AAO Dec. 9, 2019)

¹³ We note that the statements are addressed to the Petitioner's Board of Trustees. However, the record does not establish that the Petitioner has a Board of Trustees. The petition and labor certification indicate that it had only one employee, which appears to have been the Beneficiary. This inconsistency must be resolved in any future proceeding.

¹⁴ The NOIR, issued on July 25, 2017, specified that the Petitioner must establish its ability to pay for 2015. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).